

WASHINGTON STATE HUMAN RIGHTS COMMISSION

Complying with Non-Discrimination Law During a Layoff or Reduction in Force



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Introduction

The struggling world economy has had a negative impact on some Washington businesses. In case of such an impact, the Washington State Human Rights Commission (WSHRC) wants Washington businesses to be prepared to comply with nondiscrimination laws if businesses have to conduct lay-offs or reductions in force (RIF). The following is a guide for employers to use when considering a RIF and in implementing a RIF, from this viewpoint. Nothing in this document should be construed as encouraging a business to conduct layoffs or RIFs. This document is not legal advice. This guide focuses on anti-discrimination law under RCW 49.60 and the federal Age Discrimination in Employment Act (ADEA).

When businesses terminate or lay off an employee, there is always the potential that the employee will make a claim of discrimination, either to the WSHRC or the Equal Employment Opportunity Commission (EEOC), or through a private lawsuit in state or federal court. An economic need to reduce your workforce can be a legitimate, non-discriminatory reason for an employment action (such as a layoff) if you are faced with a discrimination claim resulting from a RIF or layoff. However, while you are conducting the RIF, you must be sure that you take care in determining which employees will be laid off. It is a violation of the law for an employer to target women, minorities, employees who have made discrimination claims, employees with disabilities, or older workers for layoff based on their protected class. There are a variety of protected classes in Washington State. These protected classes include; race/color, creed (religion), national origin, sex (including pregnancy and maternity), marital status, age over 40, disability, use of a guide dog or service animal by a person with a disability, HIV/AIDS or hepatitis C status, sexual orientation/gender identity, and honorably discharged veteran and military status. Protected classes under federal law are; age, disability, national origin, race, sex (including pregnancy), and religion. Targeting members of protected classes with negative employment action is called disparate treatment. For example, it is illegal to target older workers for layoff because of their age.

In addition, the U.S. Supreme Court has stated that a neutral employer policy or practice, such as a particular RIF procedure, that has a disparate impact on older workers, can also be found to be discriminatory under the ADEA. See *Smith v. City of Jackson*, 544 U.S. 228 (2005). In *Smith*, the Court ruled that disparate impact claims are allowable under the ADEA, but that there is no liability when the disparate impact on older workers is attributable to a “reasonable factor other than age” (RFAO). As in the *Smith* case these permissible factors can include salary structures that provide bigger pay increases to newer employees. The Court also ruled in *Smith* that the Plaintiffs needed to identify a specific practice within the pay plan that has an adverse impact on older workers. It is important to note, however, that employers have the burden of proof to show as an affirmative defense that the employer relied on reasonable factors other than age when making a layoff decision. See *Meacham v. Knolls Atomic Power Laboratory*, 2008 U.S. LEXIS 5029.

Paying attention to these matters may help you avoid legal troubles and possible expenses and penalties involved in a lawsuit. In general, we advocate treating all employees fairly and objectively, and in a nondiscriminatory way.

Steps to take when planning and implementing a RIF

1. You must be able to justify the RIF and show a legitimate business need for the layoffs.

2. Consider Alternatives

- Temporary shut-down
- Reductions in overtime
- Salary freeze
- Hiring Freeze
- Voluntary leave of absence
- Shortened workday or workweeks
- Voluntary separation program or early retirement incentive (be sure to seek the advice of an attorney when considering these programs)

This list is not meant to be exhaustive, or to tell you how to run your business. It just provides some examples of alternatives to a RIF.

3. Make a plan:

- Set a timeline
- Determine numbers of affected employees
- Determine which divisions, jobs, or functions will be eliminated or downsized (at this stage, never make decisions about which individual employees will be laid off).

4. Gather data on your workforce: percentages of persons in protected classes and the ages of employees. This information will be used as a baseline to analyze the impact of the RIF on protected class categories, in order to insure that workers in a particular protected class are not more severely impacted by the RIF, and that older workers are not more severely impacted by the RIF. It is a good idea to involve legal counsel at this point and to document these reasons for collecting this information on the data itself. The data may be subject to discovery in a lawsuit, so make sure you are using it for non-discriminatory ends.

5. Inform employees about the impending RIF:

- Give a general notice to the workforce and the Union – explain if the RIF is temporary or permanent, when it will take place, and generally what the company expects to happen.
- Abide by the Collective Bargaining Agreement if one is in place.
- Abide by the provisions of the Worker Adjustment and Retraining Notification Act (WARN) if applicable (more on WARN below).

6. Train the managers and supervisors who will be making the layoff decisions:
 - Explain the criteria that will be used to make layoff determinations and how to use the criteria fairly and objectively
 - Discuss the implications of anti-discrimination laws
 - Avoid hints or statements to employees about their age and/or retirement status.

Choosing Individuals for a Layoff

1. Evaluate employees

Use objective, job-related guidelines and criteria:

- Talent and experience that is consistent with business necessity
- Past performance
- Special skills that are consistent with business necessity
- Count seniority or longevity as a plus

Conduct a pre-layoff performance evaluation

- Rank individuals if you have reliable and objective performance related data
- Rank employees within groups of employees who do similar work; be sure to include all employees who do the similar types of work within the same group (in other words, do not try to shelter a favorite employee from the RIF by not including them in the group that is evaluated for potential layoff)

2. Data used for layoff decisions

Make sure the data used to make a decision about a particular employee is consistent with any previous regularly conducted performance reviews

- for example, if the employee has always had good performance reviews each year, but the pre-RIF performance review is poor, this inconsistency will raise questions about the objectivity and accuracy of the pre-RIF review
- if data is not consistent, talk to decision-making manager about the discrepancy to ensure that the decision it was based on objective criteria

3. Be consistent

- apply the same procedures and criteria to everyone
- avoid the temptation to protect an employee or certain employees from the layoff by not evaluating them, by not including them in the group of potential layoffs, or by transferring them out of a job just before a layoff; this is a red flag that you are treating some people differently.

4. Be fair and use good faith; make decisions free from any bias
 - Ensure that all of the data used in making the decision is free from bias
5. Monitor the process and the managers who make the decisions
 - Make sure that they are consistently using proper procedure and that their decisions are free from bias.
6. Review the impact on protected classes
 - Compare the group that is intended for layoff with the group that is spared from layoff.
 - If older workers or minorities rank low in the data that is gathered, then you may need to reconsider the system and criteria that you are using.
 - Do not just look at age 40 +, also look at 40 – 45, 46 – 50, and so on.
7. Document the process, the criteria used to evaluate employees, the employee ranking if applicable, the monitoring of the process, all safeguards used to ensure fairness and objectivity, and the reasons that individuals were chosen for layoff

Notice to individual employees and the exit interview

1. Be honest, clear and direct about the reasons for the layoff; give the employee the same reasons for layoff as have been documented
2. Avoid being cold or harsh; be polite, compassionate, and understanding
3. Give the employee an opportunity for questions
4. Describe any options for re-employment, severance pay disbursement if applicable, job assistance programs, and the reference policy.

Evidence that can be used in a discrimination claim to support an employee's allegation of discrimination

Statements made by managers such as:

- references to an employee's age,
- derogatory comments about older workers,
- comparisons of older to younger workers,
- age-related name-calling or joking, or
- statements about wanting a "young" company image

Failure to follow the set RIF procedures, the Union contract, or employees' own individual contracts.

A showing that certain people were protected from the RIF or were transferred out of affected jobs just before the RIF

Inconsistencies between an employee's prior performance history, prior performance reviews and/or merit raises and the employee's pre-layoff ranking or pre-layoff performance review.

Statistics

- Comparisons of the average age of employees before the RIF and after the RIF, overall and throughout divisions.
- Representation of minority groups before the RIF and after the RIF, overall and throughout divisions.

Potential liability in a discrimination claim

Payment of lost wages, pensions, benefits

Payment of interest

Reinstatement of employees

Payment of front pay and/or paying to retrain the employee

Payment of job search costs

Attorney fees

Possible class action

Other considerations during a RIF

Voluntary Separation Program (VSP)

- A benefit of this over an early retirement incentive is that the VSP is offered to both newer and long-term employees
- Be sure to analyze the protected class status of the group that is offered the VSP to ensure that no protected class is overrepresented in the group that is offered the VSP
- Make sure that the program is voluntary
- Be sure to consult with an attorney before implementing a VSP

Early Retirement Incentives

- More vulnerable to age discrimination claims
- Connect this program to years of service rather than age
- Make sure that the program is voluntary
- Consult an attorney regarding tax and ERISA issues before implementing an early retirement incentive plan

Waivers

- A release of claims against the employer in exchange for a benefit (such as a monetary payment)
- Strict standards must be met under ADEA and the Older Workers Benefit Protection Act (OWBPA):

- The individual must be knowledgeable about what he or she is signing
- The waiver must be voluntary
- The waiver must specifically state that the employee intends to waive claims under ADEA
- The employee must get something in exchange for the waiver above and beyond what they were already entitled to
- The employee must be advised that they have the option of speaking with their attorney
- The employee has 21 days to consider the agreement, or 45 days if the agreement is offered to a group of employees
- After the employee signs, they have a seven day period to change their mind and revoke the agreement
- If there is a group being offered the agreement, there must be a statement about what the eligibility factors are
- Employees and employers should be sure to consult an attorney if they wish to consider a waiver.

WARN Act

- Applicable to employers with 100 or more employees (not counting employees who have worked less than 6 months in the last 12 months and not counting employees who work an average of less than 20 hours a week).
- An employer must follow the provisions in the WARN Act for a plant closure, which is defined as shut down of more than 6 months, when 50 or more employees lose their jobs within a 30 day period at one location.
- An employer must follow the provisions of the WARN Act for a mass layoff, which is defined as 500 employees at one location or 1/3 (totaling 50 or more) of the total employees laid off at one location
- A 60 day notice must be provided to the Union or each affected employee, the state dislocated worker agency (the Employment Security Department), and the highest elected official (mayor, city manager, county commission chair) for the city or county in which the business is located
- For questions or more detailed information about WARN contact:

U.S. Department of Labor, Employment and Training Administration
 Office of Work-Based Learning
 Room N-5426, 200 Constitution Avenue, N.W.
 Washington, D.C. 20210
 (202) 219-5577

If you need additional information regarding non-federal issues, please contact the WSHRC at 360-753-6770 or 800-233-3247 (TTY 800-300-7525). Additional information on this and other civil rights issues can be found on our website at www.hum.wa.gov. This document does not constitute legal advice; if you have a particular situation about which you need legal advice, you should contact your attorney.